Supreme Court, U.S.
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In the

SUPREME COURT OF THE UNITED STATES

October Term, 1998

H. Richard Austin,
Petitioner

vs.

Hanover Insurance Company &
Massachusetts Bay Insurance Company,
Respondents

On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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PETITION FOR WRIT OF CERTIORARI

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48 pp

QUESTIONS PRESENTED

(This is an insurance contract dispute concerning a housefire in the District of Vermont.)

Are the requirements of *Daubert v. Merrell Dow* (125 L.Ed. 2d 469), FRE 702, FRE 403 regarding expert testimony and evidence optional in some Federal courts?

Where a causation issue is involved, such as this dispute involving a fire, are the following to be considered "scientifically valid" (*Daubert* p. 481) proof: expert testimony and evidence that is contradictory, fabricated, biased; physical phenonenom, the identity of which cannot be verified objectively; uncorrobated actions of dogs; fraudulent evidence?

Didn't the District of Vermont also commit harmful error and act contrary to substantial justice by preventing Petitioner's discovery of essential evidence; not permitting his pleadings to be amended to reflect the evidence; not giving correct jury instructions regarding controlling issues of law; and improperly delegating the court's authority regarding a Magistrate's erroneous orders?

Furthermore, didn't the District of Vermont act contrary to State substantive law regards the fact Respondent insurers waived their alleged evidence; fraudulently misrepresented the policy, depriving the insured of "all" privacy and thereby manufacturing false grounds for forfeiture; and also made implementation of the basic purpose of the homeowners policy (reconstruction) impossible and yet were allowed to be free of damages for their various, harmful acts and improper business practises?

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OPINIONS BELOW

The judgment (jury trial) adverse to Petitioner is dated August 1, 1997. The Court of Appeals for the Second Circuit issued its Summary Order on November 12, 1998, affirming the actions and rulings of the District of Vermont, including conduct of the trial, and denied a Petition for Rehearing on January 14, 1999.

JURISDICTION

Federal jurisdiction is based on diversity of citizenship and amount in controversy (28 USCS 1332). The verdict of the jury (August 1, 1997) was appealed in timely fashion to the Court of Appeals for the Second Circuit (28 USCS 1291) on August 25, 1997. This Petition for a Writ of Certiorari comes before the U.S. Supreme Court pursuant to 28 USCS 1254.

STATEMENT OF THE CASE

The housefire that is the subject of this insurance contract dispute occurred in Warren, Vermont on November 12, 1993, completely destroying the home of Petitioner Austin. At the time the dwelling and contents were covered by a fully paid homeowners policy (HVV #2442889) issued by Respondents - Hanover Insurance Company and Massachusetts Bay Insurance Company (both subsidiaries of the AllAmerica Financial Corporation and herein referred to as Hanover.)

Subsequent to the casualty, Austin complied with the terms for indemnification, including submission of the Proofs, quantifying the loss, that were accepted by the insurers as accurate. A few weeks after the fire, Hanover was informed that the purpose for filing the claim was reconstruction of the dwelling, a builder chosen by the company's agent providing the estimate contained in the Proofs. Nonetheless, the insurers prevented reconstruction as well as replacement of the lost contents alleging the house was destroyed for financial gain -

specifically through the use of an accelerant.

Hanover has the burden of justifying forfeiture. Pursuant to the substantive law of Vermont (and most states), the threshold issue in this type of dispute is proof that an incendiary or deliberately set fire actually took place. Without such proof the controversy ends. Because of the extent of the damage caused by the fire and other factors, a number of reasonably possible, accidental causes cannot be eliminated, including the woodstove. Under oath, Hanover's fire investigator admitted this fact.

Most of the jury trial was preoccupied with the issue of fire causation. Hardly any substantial evidence was presented by Hanover regarding additional elements of the arson defense such as motive and opportunity. To prove an incendiary cause, Hanover relied on the testimony of five, expert scientific witnesses. Austin had none because he was prevented by the court from completing discovery and was required to come to trial not properly prepared. Hanover's expert testimony, which under oath had shown itself to be contrived, self-contradictory and unreliable, never should have been admitted into the courtroom. In spite of Petitioner's motion seeking its exclusion, the District Court did not conduct any pretrial inquiry into the subject and instead allowed Hanover to introduce whatever expert testimony and evidence it wished without limitation. Thus, the court ignored completely its supervisory responsibility in this situation - *Daubert v. Merrell Dow* (125 L.Ed.2d 469), FRE 702, FRE 403, FRE 104a.

Among various matters, Austin's incomplete discovery concerns the insurers' most important evidence regarding the cause of the fire - two, allegedly positive lab tests on the fire debris that were performed at the Mercury Research Laboratory in Cary, North Carolina. These tests by a gas chromatograph/mass spectrometer (GC/MS) contain a date and time encrypted in the results which indicate the tests are not authentic. Such dating by a GC/MS occurs automatical-

ly during a test and cannot be altered later. Although given repeated opportunities to explain the discrepancy in dating and other questionable aspects of the tests, Hanover and its experts have been unable to do so and instead have continued to make overtly false statements on the subject. All available information, including trial testimony, confirms that the allegedly positive tests are a deliberate, scientific fraud and were actually performed on materials other than those taken from the subject firesite.

Hanover's allegation that the fire was deliberately set is based principally on a report incorporating the tests that was prepared by fire investigator, George Wilson of Douglas G. Peterson Associates, Greenfield, Massachusetts. During his subsequent deposition (August 6, 1996), Wilson contradicted his entire report point by point, demonstrating its speculative and fabricated character. Essentially, Wilson stated under oath that he didn't really find what he alleged in his report.

Equally relevant is the fact that Mr. Jimmy Pau, technical director of the Mercury Lab where the tests were performed, altered his opinion three times about the identity of the alleged accelerant - initially kerosene and finally No. 2 fuel oil supposedly found in an area adjacent to the boiler. This uncertainty about the precise nature of the alleged accelerant should be viewed in connection with the fact a GC/MS is one of the most precise of all laboratory instruments. During his deposition, Pau also made various false statements about basic, scientific facts, including the classification of such petroleum-derived substances. In support of these spurious allegations, he promised documentary proof from the definitive American Society of Testing and Materials (ASTM). At the trial, he acknowledged that he could not produce these documents, which contradict the ASTM's own published standards. Neither Wilson or Pau would sign their self-contradictory depositions in spite of the fact Austin submitted a motion

requesting that the court compel them to do so. Then for months, Pau allegedly went "somewhere abroad" so his deposition could not be continued regarding the tests and his numerous, false statements.

Experienced, highly paid experts don't usually repudiate their own reports, misrepresent basic, scientific facts and promise documents from respected, scientific groups that do not exist. The behavior of Pau, Wilson and Stephen Houghton (Wilson's supervisor) is one of the more revealing aspects of Hanover's allegedly reliable, scientific evidence. Based on the record, it is now clear that the insurers with the help of their experts and others attempted to create the illusion that the fire was incendiary by utilizing fabricated and supposedly "scientifically valid" evidence. Because of the mistake in the dating and the subsequent conduct of various experts, the deception has become increasingly transparent. After Austin's discovery rights were terminated, however, these experts quickly changed their behavior, once again becoming eager participants in the project. At the trial, investigator Wilson repudiated his sworn deposition the same way that under oath he previously repudiated his own report under oath. In addition, a biased police officer, who previously acted unlawfully, has played his own improper role in this matter, including at the trial.

Respondents' fraudulent conduct and injurious business practises are further demonstrated by the fact that during the claims process they deliberately misrepresented the contract as another way of manufacturing forfeiture. Hanover did so by exploiting the condensced wording of the key "cooperation clauses," asserting an all-encompassing authority over policyholders that courts have not granted to insurers. In this regard, Hanover alleges that it is entitled to "all" financial records of any kind (personal or business) belonging to its insured for six years prior to a casualty and some going back even longer. However, no matter how many records Austin produced, even more were demanded and ultimately forfeiture was asserted.

This coercive conduct was intended to deprive Austin of "all" privacy so Hanover could literally go on a fishing expedition into his entire life via his records and at the same time falsely claim forfeiture. Because of the misrepresentation involved, the insurers' actions became the subject of a Motion for Judgment as a Matter of Law - Fraud. However, the motion could not be considered by the court because Austin was improperly denied permission to amend his pleadings contrary to accepted procedures in Federal courts. Thus Respondents, fiduciaries under Vermont law, were allowed to employ their contract of adhesion in a deceptive manner, coercisively manipulate the insured and with impunity perpetrate both actual and constructive fraud.

Another aspect of the controversy that demonstrates Hanover's willingness to serve its own interests by subverting the legitimate purposes of the homeowners policy concerns the fact that reconstruction of Austin's house can never take place. Hanover not only made implementation of the policy's fundamental purpose an impossibility but even preempted his ability to assert this contractural right through due process. At the time of the fire, a mortgage of one-third the total value of house and land was held by the Northfield Savings Bank. The mortgage had a perfect ten-year record without a single late payment, and it can also be noted that Austin's credit history extending back a quarter century before the fire was equally flawless. Pursuant to what constitutes a separate contract in such policies, the insurer is obligated to discharge the mortgage and temporarily hold the lien until reconstruction can be completed. However, the insurers would not pay the mortgage, and with its rights in court about to expire (one year), the Northfield informed them it was about to bring suit. With that threat looming, the payment was finally made. Instead of holding the lien, which controlled the land with its valuable improvements, Hanover used it to avoid paying out additional money. This was done by trading the lien away to Austin's

former wife to discharge her small interest. Subsequently she sold the property. Thus by taking additional, improper advantage of its prerogatives as a fiduciary, Hanover once again engaged in the essence of bad faith, which has characterized every aspect of its harmful behavior under a homeowners policy that proved to be worthless. In its basic facts, this dispute demonstrates vividly how an insurer - the overwhelmingly strong party in this situation - can misuse its prerogatives and willingly harm the insured. It further demonstrates how easily scientific evidence can be manipulated by allegedly reputable experts to justify such actions. As a result of repeated error prejudicial to Austin's substantial rights during proceedings in the District of Vermont, it was impossible to obtain redress from Hanover's fraud and unlawful practises. To date, the results have been that Petitioner has lost his land, a house it took him ten years personally to build and possessions acquired over a lifetime.

ARGUMENT

The Orders of the Second Circuit Court of Appeals (Nov. 12, 1998 and January 14, 1999) incorrectly affirmed **the various, erroneous acts and rulings of the District of Vermont that are inconsistent with substantial justice and contrary to decisions of the U.S. Supreme Court, various circuit courts (including the Second itself), Federal Rules of Evidence and Civil Procedure, and decisions of the Vermont Supreme Court - the substantive law controlling the rights and obligations of the parties to this insurance contract dispute (28 USCS 1652).**

Furthermore, the cases cited as authority in the Second Circuit's Summary Order do not support the opinions expressed therein. This is especially true regarding expert testimony and evidence. No where in the Summary Order does the Second Circuit take notice of the fact or even mention that such testimony and evidence is a princi-

pal issue in Petitioner's appeal.

I. The District of Vermont prevented Petitioner's discovery of essential evidence, including Respondents' most important evidence regarding the cause of the fire - fraudulent lab tests.

- Summary Order: In its review of discovery matters, the Second Circuit finds no abuse of discretion by the District of Vermont. As authority, *Crudin v. Bank of New York*, 957 F.2d 961, 972 (2d Cir.'92) is cited, a case where additional discovery (regarding bad faith) was curtailed in the "absence of any evidence... tending to show bad faith."

The instant case involves a totally different situation. In the record there is strong evidence demonstrating the need for the additional discovery that was denied unfairly to Austin. This discovery concerns issues central to the dispute and was prevented by outright error or inadvertance by the court.

- Standard for Review: For an error or defect in any ruling or order to be grounds for setting aside a judgment or order, it must be "inconsistent with substantial justice". 28 USCS 61. 28 USCS 2111 (appellate courts). Error must affect the "essential fairness of the trial." *Mc Donough Power Equipment v. Greenwood* 78 L.Ed.2d 663, 670 (1984). Erroneous ruling is grounds for reversal unless "it *affirmately* appears from the whole record that it was not prejudicial." *McCanless v. Carter Coal Co.* 80 L.Ed. 1205, 1209 (1935). "If one cannot say with fair assurance...that the judgment was not substantially swayed by the error, it is impossible to conclude that substantial rights were not affected." *Kotteakos v. United States* 90 L.Ed. 1557, 1567 (1945).

Standard of review in a civil trial requires a finding of error only if it is "highly probable" that the error did not affect the outcome of case. *Lockhart v. Westinghouse Credit* 879 F.2d 43, 53 (3d Cir.'89). Appellate court will intervene

when it is shown that discovery order was plainly wrong and resulted in substantial prejudice to aggrieved party. *Navarro de Cosme v. Hospital Pavia* 922 F.2d 926, 930 (1st Cir.'91).

- Facts: A written order by the court (6/10/96) set aside a supplemental period for Austin to complete discovery in the event his summary judgment motion was denied. This denial took place on 3/17/97, and consequently he was entitled to the period already approved so inquiry into Hanover's alleged evidence could be completed.

In spite of the order on which Austin relied, the case was transferred immediately (3/20/97) from the Magistrate back to District Judge Sessions as ready for trial. In a motion (3/31/97), Austin objected promptly on the grounds his discovery was incomplete. Among various issues, the motion refers to the inaccurate and unscientific deposition testimony (August 6, 1996) of Mr. Pau, who had promised supporting documentation from the prestigious American Society of Testing and Materials that have never been produced contrary to a court order (October 28, 1996).

In connection with this noncompliance, Austin submitted a second motion regarding his incomplete discovery that sought sanctions (April 16, 1997). The motion included copies of the two, allegedly positive lab tests that are time/dated November 25, 1995, 2:32am and 4:00am - attachments Nos. 10 and 11. These tests performed on a GC/MS are the focus of Respondent Hanover's attempt to substantiate its allegation the fire was incendiary. However, as previously noted, the date/time automatically encrypted into the results indicate that the two tests were performed on materials different from those from the firesite and were substituted for the real tests. This mistake probably occurred because there was more than one group of samples so confusion could have developed regarding which was supposed to contain an accelerant.

The positive samples were allegedly in the batch taken from the firesite in Warren, Vermont on the afternoon of

November 24, 1993, when fire investigator George Wilson worked by himself. After spending most of the day there, he had to drive back to Greenfield, Massachusetts (at least four hours), sort and package the samples and ship them to Cary, North Carolina. After reaching the lab, they had to be unpacked, undergo extensive preparation and then be tested in the early morning of November 25th. All of this would have had to take place in a relatively few hours, which, of course, is impossible.

In the effort to continue his discovery into this and other matters, Austin submitted a third motion (April 27, 1997), specifically requesting that the court clarify the status of the supplemental discovery period. Attached to the motion were a copy of interrogatories that were just served on Hanover concerning the "Issue of Fraudulent Test Results," which have never been answered. Also, at this time Austin served a subpoena on Federal Express (Docket No. 129) requesting information about any deliveries made by the company to the Mercury Research Lab shortly before the questionable tests are dated. On 5/5/97 the court denied the last two motions, the motion to clarify on the grounds it was a motion for an extension of time, even though such an extension had already been granted almost a year earlier.

At the trial, Pau was finally asked about the date time encrypted in the tests. This was a very important moment in the dispute. If Hanover and Pau had been able to produce a plausible, scientifically accurate explanation for the date/times in the tests, Austin would have accepted it. However, they were not able to do so, which settles the issue and underscores the fact that Hanover, its lawyers and others are continuing to perpetuate this litigation on the basis of a serious evidentiary fraud (28 USCS 11, 28 USCS 37, 28 USCS 1927).

Before the jury, Pau's long-awaited explanation of the misdating was that the GC/MS at the lab had been turned off for several days because of electrical problems in the Cary,

North Carolina area. Supposedly the clock in the computer that controls the GC/MS was not reset when the machine was turned back on. Since Pau alleged the two tests actually took place on November 31, that would mean the GC/MS was at that point dating tests six days in error. The falsehood here is very obvious. The truth is that the computer in a GC/MS has a built-in electronic clock that continues to function even if the machine is turned off. Austin spoke to a forensic lab and the Hewlett Packard Company, which manufactured the GC/MS in question, and confirmed that turning off the power would not stop the clock in the computer that dates the tests.

It is extremely brazen of a major, national insurer to conduct itself in this fashion in a Federal court. When the *Daubert v. Merrell Dow* decision was promulgated, it is doubtful the Supreme Court could have imagined that a company that insures private homes across the country would turn Daubert's requirements into what amounts to window-dressing to be fabricated as needed to mislead court and jury and justify denial of legitimate claims. From the facts of this dispute, it is also apparent that evidentiary "validity" (*Daubert*, p.481, fn.9) is not necessarily synonymous with the authenticity of the evidence produced by some experts.

What has surfaced here is probably not be an isolated event regards the practises of these insurers and some in the fire investigation field. The dispute demonstrates how easily evidence connected to a causation event, such as a fire, can be manipulated and therefore the need to maintain stringent legal standards regarding the admission of such evidence. Apparently, Hanover had little difficulty finding experts and lawyers (officers of the court) willing to participate in this sort of undertaking. The negative impact on any homeowner trying to recover from a casualty such as this one is obvious if a mistake such as occurred here with the tests is not made, and an insurer successfully fabricates the appearance of scientific validity for its contrived evidence.

In its Reply Brief before the Second Circuit, Respondents avoided addressing the issue of the fraudulent tests and instead put forth the specious argument that the court was correct denying Austin additional discovery because he waited too long to avail himself of the supplemental period, an allegation not supported by the facts or dates in the record.

In addition to the lab tests, the District Court also acted prejudicially to Austin's substantial rights regarding other evidence, including a piece of newspaper that was not produced by Hanover and a member of the Vermont State Police until almost four years after the fire when Austin's discovery had been terminated. Previously during deposition, the officer (Harrington) did not disclose that such an item was allegedly in his possession even though he was specifically questioned about it under oath. Hanover's attorney (Gregory Clayton of Downs, Rachlin and Martin) was also asked about any physical objects in Harrington's possession and similarly did not disclose the existence of the item he later produced and relied on so heavily at the trial. (See discussion, pgs. 17-18).

II. The District of Vermont admitted Respondents' expert scientific testimony and other evidence without any pretrial review or inquiry.

- Summary Order: The Second Circuit also found no abuse of discretion or grounds for reversal regarding this and other evidentiary rulings by the District of Vermont, citing *Perry v. Ethan Allen, Inc.*, 115 F.3d 143, 150 (2d.Cir.'97). Therein, it is noted that harmful error regarding evidentiary rulings must be "manifestly erroneous," *Salem v. United States Lines Co.* 8 L.Ed.2d 313, 317 (1962).

The error by the District Court allowing the unrestricted admission of Hanover's expert scientific testimony and other evidence without any prior review, is indeed manifestly erroneous, conflicting with a procedure mandated by various Rules

(702, 403, 104a) as well as a prominent U.S. Supreme Court decision (*Daubert v. Merrell Dow* 125 L.Ed.2d 469). As previously noted, no where in its Order does the Second Circuit refer to the fact that expert testimony is in dispute in Austin's appeal. Additionally, the appellate court takes no notice of the controlling *Daubert* precedent and its requirements or the various rules relating to expert testimony.

- Standard for Review: Error may not be predicated upon a ruling which admits or excludes evidence unless a party's substantial right is affected. FRE 103a. Also 28 USCS 61. *Ricketts v. City of Hartford* 74 F.3d 1397, 1412 (2d.Cir.'96).

With respect to scientific testimony in District Courts, "the Federal Rules of Evidence leave in place the "gatekeeper" role of the trial judge in screening such evidence." *General Electric v. Joiner* 139 L.Ed.2d 508, 510 (1997). In *Grucia v. Alpha Therapeutic Corp.* 51 F.3d 638, 643 ('95), the Seventh Circuit reversed the Northern District of Illinois because "the district court abdicated its responsibility under Rule 104a by failing to conduct a preliminary assessment of the admissability of Plaintiff's expert testimony." Regarding this preliminary assessment, the Fourth Circuit in *Maryland Cas. Co. v. Thermodisc Inc.* 137 F.3d 780, 782 ('98) states that "we are called upon to decide whether the district court properly carried out its function as evidentiary gatekeeper pursuant to the Supreme Court's mandate in *Daubert v. Merrrell Dow Pharmaceuticals, Inc.*"

- Facts: Prior to the pretrial conference on 7/1/97, Austin submitted his Motion to Exclude Evidence and Testimony (6/27/97). The motion pursuant to FRE 702 and FRE 403 brought to the court's attention the unreliable and contradictory nature of Hanover's expert scientific testimony and other evidence that warranted exclusion.

At the pretrial conference, the motion was discussed briefly, and from the exchanges between the court and Austin (transcript in the record), it is obvious the court was

unfamiliar with the motion and had not read it. Nonetheless, the court did not conduct any hearing or pretrial review and instead admitted all of Hanover's expert testimony and evidence subject only to objection at trial when an ad hoc determination of admissability would be made - that is, after the jury had already heard what Austin sought to exclude. (FRE 103c - "Hearing of Jury").

Such an approach disregards completely the standards of the *Daubert* decision as well as the clear intent of the Rules. Essentially Hanover was allowed to introduce anything it wanted in the name of valid science. This included guesswork regarding the uncorroborated actions of a dog referred to prejudicially before the jury as "accelerant-detecting" (FRE 403) and certain alleged patterns in the debris, the identitity of which could not be verified by any objective procedure. No burden of proof or proffer from Hanover was required regarding any of its alleged evidence connected to the fire, and Austin was only given the opportunity to object after the testimony had been heard in open court and in effect already admitted.

III. Respondents' expert scientific testimony and evidence fails to meet the Daubert standard of "scientific validity" as well as related criteria required by the Rules (FRE 702,403 et al.)

- Summary Order: As noted, the Second Circuit finds no abuse of discretion by the District Court regarding evidentiary rulings, citing *Perry v. Ethan Allen Inc.* 115 F.3d 143, 150, a precedent that in its specifics is largely inapplicable here because it does not concern expert testimony. Instead, the Perry case involves a relevance determination of non-expert testimony that was excluded in a harrassment matter. The evidentiary issues in the instant case are totally

different. Instead of exclusion on relevance grounds, there was wholesale, unsupervised admission of unreliable, expert scientific testimony in violation of the standards of a controlling U.S. Supreme Court precedent and several Rules.

Standard for Review: FRE 103a, c; 28 USCS 61. Regarding harmful error generally in evidentiary rulings, the *Perry* case (p.150) emphasizes that "in some material respect the factfinder's judgment must be swayed by the error." *Phoenix Associates III v. Stone* 60 F.3d 95, at 105 (2d.Cir.'95). Herein, it is also observed that making the determination a substantial right has been affected adversely "involves an assessment of the likelihood that the error affected the outcome of the case." (Quotations omitted). Also, *Hynes v. Coughlin* 79 F.3d 285, 291 (2d.Cir.'96): "whether or not the evidence bears on an issue that is plainly critical to the jury's decision."

According to *Daubert v. Merrell Dow* 125 L.Ed.2d 469, 480-1, (FRE 702 and FRE 403): the trial judge must make a preliminary determination whether the proferred testimony is scientifically valid and can properly be applied to the facts at issue. The subject of an expert's testimony must be scientific knowledge, the adjective "scientific" implying a grounding in the methods and procedures of science. Similarly the word "knowledge" connotes more than subjective belief or unsupported speculation. Thus, the Court distinguishes between "validity" (does the principle support what it purports to show?) (underlining added) and "reliability" (does application of the principle produce consistent results?). The reference is to evidentiary reliability - that is trustworthiness. And therefore "in a case involving scientific evidence, *evidentiary reliability* will be based upon *scientific validity*." p.481, fn.#9.

-Facts: Five experts testified for Hanover at trial: George Wilson, Stephen Houghton (Wilson's supervisor at Douglas G. Peterson Associates), Jimmy Pau of the Mercury Lab, David Harrington of the Vermont State Police and Thomas Norton of the New Hampshire Fire Marshalls Office.

Before trial, all of these individuals had under oath either contradicted themselves or their alleged findings, made false statements regarding scientific facts or in some way invalidated Hanover's allegations about the fire. Nonetheless, this conspicuously unreliable testimony was admitted by the court without prior scrutiny, all of these experts testifying without limitation before a lay jury.

On November 24, 1993, fire investigator George Wilson worked by himself at the firesite and subsequently wrote the report on which Hanover based the allegation that the fire was intentional. As previously discussed, Wilson later contradicted under oath all of the factual findings of his own report. Its principal contention is that a socalled "accelerant pour pattern" was located on the concrete slab floor of the laundry room adjoining the boiler room, where the two allegedly positive samples of No.2 fuel oil were found. A rendering and pictures of the pattern were Hanover's principal trial displays. In spite of the emphasis Wilson places on the pattern in his report, he stated during his deposition that he never found proof where any accelerant had been poured. His exact statement: "I don't believe I indicated where an accelerant was actually poured... How much was poured or where it was actually physically poured, I do not know." (Wilson Deposition p. 26, ln.21 to p. 27, ln.2. Docket No. 158). In other words, a "pour pattern" made by an accelerant is supposedly essential evidence of accelerant usage even though the individual who allegedly found the pattern could not find where any accelerant had been "actually physically poured". Obviously this does not make a great deal of sense, especially since this and other contradictory statements came from a fire investigator with years of experience.

The subject of various patterns allegedly found under the debris that smouldered for days took up a substantial amount of time during the trial. Repeatedly Respondents' experts alleged that the patterns shown in photographs were caused by an accelerant. However, these same experts had

previously admitted under oath that they could not identify any objective procedure that verifies the true identity of the patterns - that is, if they actually exist. At the trial, the experts still couldn't produce such a verifiable procedure. In addition, it should be noted that various experts for Hanover have admitted that they could not eliminate many possible, accidental causes including electrical sources and the woodstove that probably overheated and caused the fire.

This supposedly authoritative performance included the biased and misleading testimony of Officer David Harrington of the Vermont State Police. Before trial, Harrington had shown himself to be a totally unreliable witness by committing perjury regarding the fire's cause in another court. The police investigation of the site was conducted pursuant to another voluntary release from Austin who sought as much help as possible in determining the fire's cause prior to reconstruction. The police utilized a dog trained to detect petroleum substances in fire debris. However, all tests of samples taken where the dog reacted were negative. Since the police investigation of the site was inconclusive, the report written by Harrington devotes only a few pages to the topic and does not provide grounds for reaching any definitive conclusion regarding causation. Nonetheless, at the trial both Harrington and Thomas Norton, who is in charge of the dog, asserted that the dog described repeatedly as "accelerant detecting" had in fact found an accelerant (FRE 403).

In his pretrial motion, Austin sought exclusion of the dog and also opposed all testimony by Harrington, especially regarding the fire's cause. Nonetheless, Harrington became Hanover's principal witness testifying for more than a day. The insurers' strategy was to use Harrington and thereby the authority of the Vermont State Police to rehabilitate its failed scientific evidence. As a result, Harrington spent hours opinionating about the information in George Wilson's report, which concerns an area not examined by the dog. As a result he

had no direct knowledge of it and during his testimony, made a number of significant, factual errors that caused him to apologize to the jury.

Harrington had spent years on a futile investigation, trying to blame Austin for the fire, and already discredited himself by previously swearing falsely in court to obtain an illegal warrant. The purpose was to seize some possessions in Austin's car. A few days before the fire, Austin put them there because he was about to leave on a lengthy, holiday trip (Thanksgiving and Christmas) to stay with his family in the midwest. The police knew about the items because Austin discussed them briefly with another officer (Hatch), who spoke with him on the day of the fire.

Their value was about $500. The contents of the house lost in the fire are estimated in the Proofs to be $256,000. Additional possessions worth $100,000 lost in the fire were not insured. In the trunk there were also folders with various information so Austin could take care of bills and other matters during his trip that was expected to last more than two months. After leaving the firesite, Austin later examined the trunk and found that by mistake he had taken his insurance folder. Officer Hatch had asked him if he had any insurance documents in the car, and at the time Austin stated no. As a result, he telephoned Hatch and offered to bring the file to the barracks so the police could take possession of it. Hatch declined the offer; however, Harrington later seized this and other items with a warrant based on an affidavit that included statements the "accelerant-detecting" dog definitely found proof of accelerant usage. The Barre Administrative Court was not informed that at the time no tests had been conducted on the samples.

The circumstances surrounding the insurance documents have been distorted to serve Hanover's interests. However, two facts are not in dispute. Austin could have easily destroyed the folder and its presence in the car only became known when he phoned the police. The call proved to be a

serious error of judgment and probably caused this dispute. With that information to use against him, Austin had, in effect, given Hanover an excuse not to meet its obligations under the policy. However, the insurers needed an incendiary fire and set out to create one with the help of its experts and others.

Harrington's willingness to conduct himself unlawfully is further demonstrated by his use of a newspaper he removed from Austin's front lawn a few days after the fire. This copy of the Wall Street Journal had been on the ground for almost a month near a tree stump Austin was cutting up with a chain saw. Allegedly Harrington sent the newspaper to the New York State Crime Lab for analysis. During his deposition almost three years after the fire (8/6/96), Harrington was specifically questioned about the newspaper and any physical objects in his possession, and at the time he did not disclose that he had any of the newspaper. Several months later, however, when Austin's summary judgment motion demonstrating Hanover's failure to prove the fire's probable cause was declined, Harrington suddenly produced what he alleged was some of the newspaper. He did so after the case had been transferred back to the district judge as ready for trial. Hanover's attorney hasjustified this belated production of the item on the grounds a discovery response was being updated. Why it hadn't been updated earlier at the deposition wasn't explained.

In the Motion to Exclude, Austin opposed use of the physical newspaper as evidence (not the subject matter) and reinterated this opposition at the pretrial. What was finally produced at the trial was not the newspaper from Austin's lawn. Someone had partially filled a gallon paint can with foul smelling oil and stuffed a wad of paper in there. Ultimately the paint can ended up in the jury room. Such a powerful odor would have had a strong psychological effect on the jury members, which, of course, was the intended purpose.

IV. The District of Vermont acted contrary to Federal

and Vermont law by not giving correct jury instructions concerning elements of law relevant controlling the dispute.

Summary Order: The Second Circuit's Order notes that error in jury instructions must be prejudicial in light of the charge as a whole, once again citing *Perry v. Ethan Allen* 115 F.3d 143, 153. The court concludes that Petitioner Austin could not prevail on his jury instruction claims "because other language in the charge clarified the proper standard for an affirmative defense of arson and his proposed instruction on defendant's waiver of certain evidence has no basis in law." The Second Circuit is incorrect that the overall arson defense is the issue disputed here. Austin is not questioning this particular instruction but instead other aspects of the incomplete and misleading jury charge.

Standard for Review: "Jury instruction is erroneous if it misleads the jury as to the correct legal standard or has not adequately informed the jury on the law." *Anderson v. Branen* 17 F.3d. 552, 556 (2d.Cir.'94) cited in *Perry* at 153. This statement quoted by the Second Circuit demonstrates the point Austin is trying to make. Additionally, an erroneous instruction, unless harmless, requires a new trial. *Memphis Community Sch. Dist. v. Stachura* 477 U.S. 299, 312.

Facts: Prior to the pretrial conference (7/1/97), Austin submitted his Requests to Charge. Among others, he requested instructions regarding a) the insurer's obligation to prove the fire's "probable cause"; b) the role of "circumstantial evidence"; and c) Hanover's prior waiver or surrending of its alleged evidence. All of these requests were supported by competent, legal authority.

a) Probable cause. Since the fire's cause is the threshold issue of the dispute, a proper instruction on the evidentiary standard that constitutes proof of such a causation event was essential. It was particularly important in this situation because a number of prominent, accidental causes of the subject fire

have not been eliminated. Three, Federal precedents on the subject are cited by Austin: *Gichner v. Antonio Troiano Tile & Marble Co.* 410 F.2d 238 (DC. Cir.'69); *Breidor v. Sears, Roebuck and Co.*, 722 F.2d 1134 (3d Cir. '63); and *Lanza v. Poretti* 537 F.Supp. 777 (ED. Pa.'82). Nonetheless, the District Court declined to give any instruction on the highly relevant legal concept of probable cause.

b) Circumstantial Evidence. In their Reply Brief, Hanover also contends that the overall jury charge cured any deficiencies and in that regard quotes the instruction given by the court on circumstantial evidence. Respondents' entire case, including fire causation, is circumstantial, which is typical of these types of disputes, where evidence is often highly ambiguous. However, reliance on the circumstantial can create a situation ripe for innuendo and false accusation. This is exactly what occurred here over and over, especially regards the cause of the fire.

Westchester Fire Insurance Company v. Deuso (146 Vt. 424, 505 A.2d. 666, '85) is the controlling precedent in the substantive law regarding the overall arson defense and its components, the first of which is that the fire must be proven to be incendiary. Several cases are cited therein, and in all of them the circumstantial evidence proving that the fire was deliberately set is very strong and virtually indisputable. Examples: *Boone v. Royal Indemnity Company* 460 F.2d 26, 28 (10th Cir. '72) - "arson conceded to have been the source. Several pounds of explosive substance..."; *Great American Insurance Co. v. K W Log Inc.* 591 P. 2d 457, 459 (Court of Apppeals of Washington, '79) - "600 to 700 pounds of Trojan dynamite had been used"; *Great Southwest Fire Insurance Co. v. Stone* 402 So. 2d 899, 900 (Supreme Court of Alabama '81) - "four fires set at different locations within the building and originated from plastic containers containing gasoline." As stated in *Great Southwest*: "Evidence which affords nothing more than mere speculation, conjecture, or guess is wholly

insufficient to warrant submission of the case to the jury."

These cases demonstrate the quality or strength of the circumstantial evidence required in Vermont and most states to prove the arson defense, including the pivotal issue of a fire's probable cause. *Westchester Fire v. Deuso* replaced a long-standing Vermont fire case *Girard v. Vermont Mutual Fire Insurance Company* 103 Vt. 330, 154 A. 666 (1931) regarding the arson defense. However, it left intact the portion of the *Girard* case that concerns circumstantial evidence itself. As stated in *Girard* at 335: "..If they (ie circumstantial evidence) are fairly susceptible of two constructions, the one that frees them from the imputation of fraud must be accepted." (statement in parenthesis and underlining added).

The instruction given by the court omitted completely this important requirement, which is mirrored in the *Great Southwest* quote - namely that ambiguous circumstantial evidence does not constitute adequate proof. The court's charge gave only the portion of the *Girard* standard regarding circumstantial evidence that is favorable to Hanover but left out the rest favorable to Austin. As a result, it was biased and inadequate. As far as the jury understood the matter, any circumstantial evidence, no matter how ambiguous, could be used in the preponderance of evidence against Austin, including in support of allegations that the fire was deliberately set. In fact, according to the standard controlling in Vermont, such ambiguous evidence should have been interpreted against the party using it as proof. Since almost everything Hanover relied upon as evidence at the trial can be given an interpretation favorable to Austin, the insurer was in effect providing proof for rather than against him - an essential legal fact about which the jury was totally unaware.

c) Waiver of Evidence. This omitted instruction is discussed in Section VIII in connection with Austin's pretrial motion for judgment as a matter of law - waiver. Regarding this instruction, the Second Circuit states incorrectly

that it "has no basis in law," a point of view the District Court apparently shared because the motion for judgment on the subject was rejected. However, that motion is well-documented by Vermont and other legal precedent. As a result, the omitted charge resulted in the court incorrectly instructing the jury regarding the applicable law.

In its Reply Brief, Hanover states that Austin surrendered any right to raise the issue on appeal because he did not object properly at trial. However, "Absent objection, an error may be pursued on appeal ...inobvious cases of misapplied law." *Metromedia Co. v. Fugazy* 883 F.2d 350, 363 (2d.Cir.'92), quoting *City of Newport v. Fact Concerts* 453 U.S. 247, 256.

V. The District of Vermont issued an incorrect interlocutory order denying Petitioner's summary judgment motion (fire causation) and granting Respondent's cross motion on the bad faith claim.

Summary Order: The Second Circuit accepts without reservation the District Court's statement that it conducted a de novo review of both the summary judgment motion and cross motion. However, facts in the record demonstrate otherwise. This includes the numerous, uncorrected errors (approximately 20) in the report of the Magistrate who initially examined the motions. Furthermore, the appellate court upholds denial of the summary judgment motion on the improper grounds that there are "issues of material fact with respect to the elements of Defendants' arson defense." However, the overall arson defense and material facts related to its various elements are not in dispute in the motion but rather only the first component of the defense - whether an incendiary fire actually occurred.

Standard for Review: FRCP 56. Summary judgment is mandated against the party "who fails to make a showing sufficient to establish the existence of an element essential to that

party's case...necessarily renders all other facts immaterial (emphasis added)..." *Celotex v. Catrett* 477 US 317, at 317.

Function of appellate courts is not to decide factual issues. Instead "..authority of an appellate court ...is circumscribed by the deference it must give to decisions of the trier of fact..."*Zenith Radio v. Hazeltine* 23 L.Ed. 2d 129, 148. *Transport Equipment v. Guaranty State Bank* 518 F.2d 377, 383 (10th Cir.,'75).28 USCS 52. By repeating the Magistrate's improper reliance on allegedly material facts not at issue in the summary judgement motion, the Second Circuit did exactly what it is supposed not to do, in effect preempting the ability of the district judge to make his own evaluation of the matter, which never took place as required by the Rules.

"Judge of the court shall make a de novo determination of those portions of the report... to which objection is made. 28 USCS 636(b)(1); 28 USCS 72. *Perez-Rubio v. Wyckoff* 718 F.Supp. 217, 227 (SDNY. '89).

Facts: On October 18, 1996, Austin submitted his motion for summary judgment, which drew to the court's attention the fact that the insurers had not come forth with sufficient evidence to prove the fire's probable cause was incendiary - the indispensable element of their case (*Celotex v. Catrett).* This was done on the basis of Hanover's discovery responses that state what the insurers regard as their evidence on the subject. In that context, the motion quotes from the deposition testimony of Hanover's experts.

Initially the motion was reviewed by the Magistrate, who misread the document. Austin objected in timely fashion citing specific errors. Nonetheless, the report was accepted in its totality by the District Judge. Since none of the errors in the report were corrected, it isn't possible that the judge could have actually reviewed the motion, and as a result, the court improperly delegated its authority to the Magistrate (28 USCS 636b(1)). Therefore, the motion is still pending.

The Magistrate devotes much of his report to allega-

tions related to various aspects of the arson defense which are not in dispute in the motion. This reflects Hanover's opposition that also emphasizes such subject matter rather than merely addressing the issue in contention - namely, that the experts on which it relies had under oath contradicted or otherwise invalidated their own findings. Thus, Hanover's opposition to the motion varies significantly from its own discovery responses. However, Hanover's failure to prove the essential element of their case "renders all other facts immaterial," including those to which the Magistrate and Hanover give such emphasis.

The Second Circuit compounds the problem by also stressing this information concerning other aspects of the arson defense as proper grounds for declining the motion. Thus the appellate court comments: "...inlight of evidence indicating that the cause of the fire was incendiary in the instant case, including evidence obtained from the Vermont police, Austin could not have won on his claim of bad faith."

Such evidence from the police was not produced, and this is confirmed by Hanover's answers to interrogatories. Thus, the only alleged evidence from the police at issue in the motion is the uncorroborated actions of the dog, and Hanover's witnesses are quoted as stating under oath that no one knows what the dog detected.

If the District Court didn't examine the summary judgment motion, the same would be true of the cross motion regarding bad faith. As a result, the court also improperly approved the Magistrate granting Hanover's cross motion. Furthermore, at this time it is premature to relieve the insurers of bad faith. Austin's summary judgment motion is still pending. In addition, he has put forth two, meritorious motions pursuant to FRCP 50. If he is entitled to summary judgment or judgment as a matter of law (both directed verdict standard), he would have substantiated the bad faith issue - ie that the claim was not reasonably debatable. (*Bushey v. Allstate* 670 A.2d 807, 809. Additionally, there is ample information in the

record demonstrating fraudulent conduct by Hanover. Fraud of any variety is synonymous with bad faith. In Vermont, an insurer is a fiduciary, *Phillips v. Aetna Life* 473 F.Supp. 984, 989 (D.Vt. '79) citing *Johnson v. Mutual Hardware Casualty* 109 Vt. 481, 1 A.2d 817. One who breaches the fiduciary's duty of good faith conduct is liable to the aggrieved party." *Peerless Casualty Co. V. Cole* 121 Vt. 258, 265.

VI. The District of Vermont acted contrary to state substantive law by also mproperly striking Petitiooner's claims for emotional distress and punitive damages.

SUMMARY ORDER: The Second Circuit does not specifically address this issue, which once again apparently comes under the umbrella statement that "Austin's other claims lack merit."

Standard for Review: Intentional infliction of emotional distress: In Vermont, the four elements of the tort are outrageous conduct, done intentionally or with reckless disregard of the probability of causing emotional distress, resulting in the suffering of extreme emotional distress, actually or proximately caused by the outrageous conduct. *Sheltra v. Smith* 392 A.2d 431, 433 (Vt. '78). Concept applied to insurance disputes, *Phillips v. Aetna Life Ins. Co.* 473 F.Supp. 984, 989, citing *Fletcher v. W. National Life* 10 Cal.App. 3d 376 (1970), 47 ALR 3d 286, 303: "...emotional distress may consist of any highly unpleasant mental reaction such as fright, grief, shame, humiliation..." Also, "..recovery may be had for emotional distress alone without resulting physical injury." *Fletcher* 301.

Punitive Damages: Actual, not implied malice must be shown by conduct manifesting personal ill will, "or even by conduct manifesting nothing worse than a reckless and wanton disregard of the plaintiff's rights." *Sparrow Admr. v. Vermont Savings Bank* 95 Vt. 29, at 33; 112 A. 205, cited in *Phillips*.

Facts: On July 29, 1997 (second day of trial), Hanover

was granted judgment as a matter of law regarding Austin's two, remaining claims for extra-contractural damages. The court improperly removed the claim for emotional distress principally because of a lack of physical injury which is not required in this situation as contrasted with negligence cases.

At the same time the court improperly struck the claim for punitive damages. However, the standards outlined in the *Sheltra* and *Sparrow* cases are abundantly documented by the facts to which Austin testified at the trial and discussed with the District Judge. There can be no question that the insurers repeatedly demonstrated a reckless disregard of the insured's interests and rights with the knowledge they were causing him serious harm and emotional suffering. To conclude otherwise would suggest that there are no reasonable restraints on the conduct of insurers issuing homeowners policies, and it is permissable to misrepresent the policy, produce fraudulent evidence, refuse to pay a mortgage, benefit themselves financially to the detriment of the insured, make implementation of the policy's basic purpose impossible no matter what happens in court, and cause years of unnecessary litigation. And they can with impunity accomplish all of this through the deliberate misuse of their privileged fiduciary role.

VII. The District of Vermont acted contrary to Federal and State law by not allowing the Petition to be amended to include Respondents' misrepresentation of their policy through which they manufactured false grounds for forfeiture.

Summary Order: In spite of the significance of this issue, the Second Circuit does not specifically address it. Instead the subject apparently comes within the generalized comment that "Austin's other claims lack merit."

Standard for Review: "...leave(to amend) shall be freely given when justice so requires..." FRCP 15(a). In the absence of undue delay, bad faith or dilatory motive on the part of the

movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party, "leave sought should as the rules require, be 'freely given'". *Foman v. Davis* 9 L.ed. 2d 222, at 226 (1962), interpreting 15a. The rationale given by the District Court for not allowing Austin to amend his Petition is not in accord with the standards cited here by the Supreme Court.

Facts: On 6/10/97, Austin submitted a motion for judgment as a matter of law (28 USCS 50) on the grounds that during the claims process Hanover deliberately misrepresented the policy's key "cooperation clauses." Interpretating the clauses deceptively, Hanover made unjustified demands for financial documents that number in the thousands. In spite of the fact courts have not granted insurers such an all-encompassing prerogative pursuant to a homeowners policy, Hanover insisted that they have this right. Although Austin produced large amounts of such documents, forfeiture was asserted nonetheless.

In this fashion Respondent insurers are deliberately misusing the commerical contract they create in order to manipulate improperly the people insured under it. To accomplish this purpose, they take unfair advantage of their superior knowledge regarding the derivation of the policy's abbreviated wording with which many lawyers are not familiar. The fraud clause in an insurance policy deprives the insured of coverage under appropriate circumstances, including material misrepresentation. However, an even more stringent standard applies as well to the insurer that creates the policy. Since Vermont law regards the insurer as a fiduciary, Hanover's deliberate misrepresentation of its policy constitutes both constructive and actual fraud. As a result, Respondents voided all rights to invoke any defense based on the policy they misused in this fashion.

On 6/1/97, Hanover moved to strike Austin's motion for judgment on the grounds that his Petition contains no reference to this fraud. On 6/17/97, the district court issued its

notice for a pretrial conference (7/1/97) and requested "a statement as to whether there are amendments to the pleadings, and if so, a motion to amend the pleadings." In response Austin promptly (6/27/97) filed such a motion to include the issue. However, at the pretrial conference, the court abruptly reversed itself, stating that "it'stoo late to amend your complaint at this point."

Thus, the court arbitrarily prevented Austin from legitimately amending his petition so the pending motion for judgment could be considered that should have decided the dispute in his behalf. Also, since the Petition had not been amended, Austin was unable to take advantage of this evidence at the trial. Hanover has not produced any information that refutes the fact that they engage in such fraud. At the pretrial conference, Hanover was allowed with impunity to retract the two, fraudulent grounds for forfeiture and proceed to trial on their core defense, which employs an even more serious fraud - fake lab tests and spurious expert testimony related to those tests.

VIII. The District Court also acted contrary to Vermont law by denying Petitioner's other unopposed motion for judgement as a matter of law - waiver that demonstrates the insurers previously surrendered their alleged evidence. Additionally, the court erred in not giving a jury instruction regarding such waiver.

Summary Order: In connection with the requested jury charge regarding waiver, the Second Circuit states that Austin's contention that Hanover waived its evidence "has no basis in law". However, the appellate court is incorrect. Austin's motion for judgment, that was unopposed but denied nonetheless, provided the court with strong legal and factual grounds for such waiver of evidence as a matter of law. In addition, the citations accompanying his requested jury charges restate these

legal grounds.

Standard for Review: It is a long-standing concept in the law of Vermont and many other states that an insurer can under certain circumstances waive alleged grounds for forfeiture. *Cummings v. Connecticut General Life Insurance Company* 102 Vt. 351, at 360; 148 A. 484 (1930); *Pellon v. Connecticut General LIfe Insurance* 105 Vt. 508, 522; 168 A. 701 (1933); and *Max Mears v. Farmers Fire Insurance Company* 112 Vt. 519, at 522.

Facts: On 6/27/97, Austin submitted his motion for judgment concerning waiver that includes explicit documentation demonstrating that by late December 1993, or about six weeks after the fire, the insurers had already decided not to permit reconstruction. At this point, the information available to them was little more than the fabricated investigatory report that George Wilson later repudiated under oath and the fraudulent lab tests. Thus before taking such a serious step, Hanover did not wait to conduct a full and fair investigation. This includes anything that might have been learned during the examinations under oath, which took place months later. As a result, it is now abundantly clear that from the outset Hanover's claims personnel had nothing in mind but to save their company a substantial amount of money by finding a way of thwarting Austin's legitimate claim to rebuild his house regardless of how they had to go about the task.

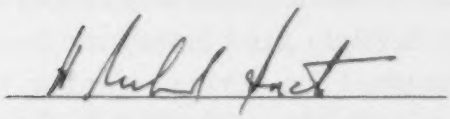
In its Reply Brief before the Second Circuit, Hanover finally answered the motion regarding waiver (more than six months after the time permitted by the Rules) and makes various inaccurate statements, including that such waiver only applies to life insurers. Basically the legal issue involved here concerns the fact that the insured should be promptly informed if he or she no longer has coverage. This is a simple and equitable principle of insurance law. However, Hanover apparently decided that its interests were served by giving Austin the false impression as long as possible that he had a viable policy -

even if that caused him to make various futile plans for reconstruction. For that reason, they retained the premium and in other ways treated the contract as still valid. Thus while once again acting with deception, Hanover inadvertantly waived its alleged evidence (including fire causation case), something that in the context of their various improper and unlawful acts is both ironic and highly appropriate. However, because the court refused to give an instruction on the subject, the jury was totally unaware of this highly relevant legal fact, and Austin was deprived of the opportunity to take advantage of such waiver at the trial.

IX. Conclusion.

In the interests of substantial justice, the facts and issues detailed in this Petition warrant the issuance of the requested Writ so the Supreme Court can intervene in this matter and enforce its own recognized legal standards and others that should properly determine the outcome of this dispute.

Respectfully submitted,



H. Richard Austin
P.O. Box 6514
Chesterfield, MO 63006
(314) - 227-9528

Appendix A

UNITED STATES DISTRICT COURT
District of Vermont

H.RICHARD AUSTIN, Judgment in a Civil Case
Plaintiff.

Case No:1-95-CV-170

v.

HANOVER INSURANCE COMPANY, MASSACHUSETTS BAY INSURANCE COMPANIES,
Defendant.

X Jury Verdict. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

Decision by Court. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that pursuant to the Jury Verdict (Paper No. 166) filed August 1, 1997, the defendants are not liable as the plaintiff has alleged in his complaint. JUDGMENT is hereby entered for defendants Hanover Insurance Company and Massachusetts Bay Insurance Companies.

Motion for Judgment as a matter of law on claims of intentional infliction of emotional distress and punitive dam

ages was granted on July 29, 1997.

Date: August 1, 1997 RICHARD PAUL WASKO
Clerk

/S/ C.Burbank
(By) Deputy Clerk

JUDGMENT ENTERED ON DOCKET
DATE: 8/1/97

Appendix B

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUMMARY ORDER

THIS SUMMARY ORDER WILL NOT BE PUBLISHED IN THE FEDERAL REPORTER AND MAY NOT BE CITED AS PRECEDENTIAL AUTHORITY TO THIS OR ANY OTHER COURT, BUT MAY BE CALLED TO THE ATTENTION OF THIS OR ANY OTHER COURT IN A SUBSEQUENT STAGE OF THIS CASE, IN A RELATED CASE, OR IN ANY CASE FOR PURPOSES OF COLLATERAL ESTOPPEL OR RES JUDICATA.

At a stated term of the United States court of appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the 12th day of November, one thousand nine hundred and ninety-eight.

PRESENT;

Hon. Wilfred Feinberg,
Hon. Dennis Jacobs,
Hon. Robert D. Sack,
Circuit Judges

H. Richard Austin,
Plaintiff-Appellant,

v.

Hanover Insurance Company, et al.,
Defendants-Appellees.

APPEARING FOR APPELLANT:
H. Richard Austin,
pro se
Chesterfield, MO

APPEARING FOR APPELLEES:
Gregory S. Clayton
Downs Rachlin &
Martin PLLC
Littleton, NH

Appeal from the United States District Court for the District of Vermont (Murtha, Ch.J.)

UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the judgment of said District Court be and it hereby is AFFIRMED.

H. Richard Austin, pro se, appeals from a judgment in the district court entered following a jury verdict in favor of the defendants.

In his complaint, Austin alleged that after the defendants issued him a fire insurance policy, defendants would not pay him the required sums after his house was destroyed by fire; Austin also alleged that defendants acted in bad faith. In response to Austin's charges, defendants claimed that Austin set fire to his own house.

On appeal, Austin argues, in part, that: 1) he was improperly denied discovery of essential evidence, thus, compelling him to go to trial unprepared and without an expert witness; 2) the district court improperly denied requested jury instructions; 3) the district court erred in admitting

certain evidence; and 4) the district court never reviewed the magistrate judge's recommendation that partial summary judgment be granted in favor of the defendants.

Austin's arguments concerning discovery proceedings and evidentiary rulings are meritless because he fails to show that the district court abused its discretion in its ruling on these matters. See Curdin v. Bank of New York, 957 F.2d 961, 972 (2d Cir. 1992)) (holding that discovery rulings will be reversed only upon a clear showing of an abuse of discretion); Perry v. Ethan Allen, Inc. 115 F.3d 143, 150 (2d Cir. 1997) (holding that evidentiary rulings are reviewed for an abuse of discretion, and erroneous evidentiary rulings "will not lead to reversal unless affirmance would be inconsistent with substantial justice.")

This Court reviews a claim of error in the district court's jury instructions de novo and will reverse on this basis only if the appellant can show that the error was prejudicial in light of the charge as a whole. Perry, 115 F.3d at 153. Austin cannot prevail on his jury instruction claims because other language in the charge clarified the proper standard for an affirmative defense of arson and his proposed instruction on defendants' waiver of certain evidence has no basis in law. Thus, the court did not err in its instructions to the jury on the law. Id. ("A jury instruction is erroneous if it misleads the jury as to the correct legal standard or does not adqequately inform the jury on the law."(quotations omitted.))

Austin claims that the idstrict court never reviewed his summary judgment motion after he submitted his objections to the magistrate judge's report and recommendation; however, the district court order belies Austin's claim and indicates that de novo review occurred. To the extent that Austin seeks to challenge the district court's denial of summary judgment in his favor and its grant of partial summary judgment in favor of

defendants, Austin cannot prevail because there were issues of material fact with respect to the elements of defendant's arson defense. See Westchester Fire Insurance Co. v. Deuso 146 Vt. 424, 427, 505 A.2d 666, 667-68 (1985). Additionally, in light of evidence indicating that the cause of the fire was incendiary in the instant case, including evidence obtained from the Vermont police, Austin could not have won his claim of bad faith. Bushey v. Allstate Insurance Co. 164 Vt. 399, 670 A.2d 807, 809 (Vt. 1995).

Austin's remaining claims lack mert.

For the reasons set forth above, the judgment of the district ocurt is hereby AFFIRMED.

FOR THE COURT
Carolyn Clark Campbell, Clerk

By: /s/ Lucille Carr

Appendix C

UNITED STATES COURT OF APPEALS
for the Second Circuit
United States Court House
40 Foley Square
New York 10007

CAROLYN CLARK CAMPBELL
Clerk

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the 14th day of January one thousand nine hundred and ninety nine.

Austin

v Dkt. No: 97-9069

Hanover Insurance Co

A petition for rehearing en banc having been filed herein by the appellant H. Richard Austin.

Upon consideration of the panel that decided the appeal, it is Ordered that said petition for rehearing is **DENIED**.

It is further noted that the petition for rehearing en banc has been transmitted to the judges for the court in regular active service and to any other judge that heard the appeal and that

no such judge has requested that a vote be taken thereon.

FOR THE COURT
CAROLYN CLARK CAMPBELL, Clerk

By: /s/ Beth Meador
Beth J. Meador,
Administrative Attorney

Supreme Court, U.S.
FILED
MAY 12 1999
CLERK

No. 98-1655

IN THE

Supreme Court of the United States

H. RICHARD AUSTIN,

Petitioner,

v.

HANOVER INSURANCE COMPANY and
MASSACHUSETTS BAY INSURANCE COMPANY,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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STATEMENT PURSUANT TO RULE 29.6

The petition correctly identifies the parties to the proceeding.

The following are parents of Respondent Hanover Insurance Company: Allmerica Financial Corporation, First Allmerica Financial Life Insurance Company, SMA Financial Corp. and Allmerica Property & Casualty Companies, Inc. Allmerica Financial Corporation is publicly traded on the New York Stock Exchange. There are no other publicly held corporations owning 10% or more of Hanover Insurance Company's stock.

The following are parents of Respondent Massachusetts Bay Insurance Company: Allmerica Financial Corporation, First Allmerica Financial Life Insurance Company, SMA Financial Corp., Allmerica Property & Casualty Companies, Inc. and Hanover Insurance Company. Allmerica Financial Corporation is publicly traded on the New York Stock Exchange. There are no other publicly held corporations owning 10% or more of Massachusetts Bay Insurance Company's stock.

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STATEMENT OF THE CASE

The *pro se* petition filed by H. Richard Austin is the final of repeated attempts by Mr. Austin to overturn the verdict of a Vermont jury concluding that he intentionally burned down his house and then made material misrepresentations about his resulting insurance claim to Respondents, Hanover Insurance Company and Massachusetts Bay Insurance Company.

Petitioner's petition follows: (1) partial summary judgment issued on March 17, 1997 by the United States District Court for the District of Vermont dismissing Mr. Austin's bad faith claims; (2) judgment as a matter of law entered by the United States District Court on July 29, 1997 at the close of Mr. Austin's evidence, dismissing his claims for intentional infliction of emotional distress and punitive damages; (3) jury verdict and final judgment against Mr. Austin entered by the United States District Court on August 1, 1997; (4) summary affirmance by the Second Circuit Court of Appeals on November 12, 1998; and (5) denial of Mr. Austin's Petition for Rehearing En Banc by the Second Circuit Court of Appeals on January 14, 1999.

As set forth below, there is no good basis for further judicial review of this matter. Petitioner continues to press discovery issues, evidentiary issues that he failed to preserve at trial and disagreements with the appropriateness of jury instructions under Vermont law. Most of these issues were found meritless and not warranting discussion by the Second Circuit. The remainder were dispensed with summarily. Significantly, while Petitioner raises various arguments directed to the finding that he intentionally set fire to his house, he raises no challenge to the independent jury verdict that he could not recover against Respondents because he made material misstatements of fact in connection with his insurance claim. While either ground supports judgment

against him, Petitioner now only challenges the finding of arson.

Petitioner's statement of facts is rife with misstatement. He claims that there was scant evidence of motive for an arson fire. Yet, the evidence showed that in just two years before the fire Mr. Austin accumulated $50,000 to $60,000 in credit card debt and sustained significant stock market losses. He also owed a divorce payment of $77,000 due one week before the fire. He had no income in this period. This financial crisis led Mr. Austin to borrow money from a relative, forge his deceased mother's signature on checks and use her credit cards to obtain illegal cash advances.

Petitioner claims that there was little evidence of opportunity. The trial evidence, however, showed that Mr. Austin could not substantiate his whereabouts after checking into a hotel the evening before the fire. Further, the evidence at trial showed that Mr. Austin left the hotel in the early morning hours, in plenty of time to return to his residence to start the fire.

Petitioner claims that most of the trial was preoccupied with the issue of fire causation. He fails to mention that a Vermont State Police officer at the fire scene noticed that Mr. Austin's car seemed heavily loaded down, and after inspecting the trunk found it tightly packed with business records, a personal computer, Mr. Austin's homeowner's insurance policy, photographs of the contents of his home, family heirlooms, religious objects and legal files pertaining to a petition for certiorari that Mr. Austin was readying to file with this Court in another case.[1] Mr. Austin removed all of these items from his residence shortly before the fire. His explanations for doing so were conflicting.

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1. *See Austin v. United Parcel Service*, 510 U.S. 1196 (mem.); *reh'g denied*, 511 U.S. 1152 (1994).

Petitioner claims that the testimony of Respondents' experts on fire cause and origin was contrived, false and fraudulent. He neglects to mention that he called no expert witnesses and that the Vermont State Police fire investigator who investigated this fire and the independent cause and origin experts retained by Respondents independently determined that this fire was incendiary. He neglects to mention that two positive samples of liquid accelerants were discovered within the first floor of the residence, and liquid pour patterns were found in this same area. He neglects to mention that a fuel-oil soaked *Wall Street Journal* matching these positive samples was discovered on the lawn outside his house and that the valves leading to his furnace had been manually turned prior to the fire.

Petitioner erroneously claims that he was not permitted adequate discovery, yet this case was filed in August 1994 and the discovery deadline was twice-extended at Austin's request until October 1, 1996, affording Mr. Austin over two years in which to prepare.

Petitioner claims that the United States District Court failed to exercise its "gate-keeping" role under *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), but fails to mention that not once during the course of trial did he: (1) challenge the credentials or qualifications of Respondents' experts (two fire marshals, two independent cause and origin experts and one chemist); (2) object to the admission of the expert conclusions of these five witnesses; or (3) request to voir dire any of these experts. Furthermore, the scientific underpinning of the expert conclusion that this fire was incendiary was the subject of considerable, uncontradicted testimony.

REASONS FOR DENYING THE PETITION

There is no basis for review of this matter by this Court. The arguments raised by Petitioner to challenge the jury verdict against him concern principles long settled which were correctly applied by both the District Court and the Second Circuit. No conflict of authorities or conflict among the Circuits is alleged. No important constitutional issues are framed. Instead, the petition primarily seeks to overturn factual determinations by a Vermont jury and the District Court's rulings on various discovery and evidentiary matters, protected under an abuse of discretion standard.

I.

THERE IS NO SUGGESTION THAT THE DISTRICT COURT ABUSED ITS DISCRETION IN REFUSING TO FURTHER EXTEND THE ALREADY TWICE-EXTENDED DISCOVERY DEADLINE IN THIS CASE.

This case was filed in August 1994. Twice, Petitioner sought extensions of the discovery schedule set by the District Court, and twice those deadlines were extended, such that discovery closed more than two years after filing, on October 1, 1996. Petitioner's third request for an extension was denied. Fed. R. Civ. P. 16(b) contemplates a scheduling order setting discovery deadlines and imposes a "good cause" requirement for amendment. As there is no clear showing that the District Court abused its discretion by declining to further extend the deadline for completion of discovery, there is no error. *Cruden v. Bank of New York*, 957 F.2d 961, 972 (2d Cir. 1992).

II.

PETITIONER WAIVED ANY *DAUBERT* CLAIM BY FAILING TO MAKE CONTEMPORANEOUS OBJECTION TO THE ADMISSION OF EXPERT TESTIMONY AT TRIAL.

Before trial, Petitioner filed a motion in limine seeking to exclude testimony by two of the five expert witnesses called at trial by Respondents. The District Court denied the motion, but granted Petitioner the right to raise any objections to expert testimony during trial. Despite this opportunity, Petitioner did not object once to the qualification of the four cause and origin experts and one chemist called by Respondents. Petitioner did not object once to any of the expert opinions offered by these experts. Petitioner did not request to voir dire these experts prior to testimony. The only objection Petitioner made was to one of the five witnesses (Thomas Norton), and that objection was not made until after Mr. Norton's testimony already was complete. This issue was not preserved by contemporaneous objection as required by Fed. R. Evid. 103(a)(1), and thus, absent plain error it is waived. *United States v. Coonan*, 938 F.2d 1553, 1564 (2d Cir. 1991), *cert. denied*, 502 U.S. 941 (1992).

III.

THE DISTRICT COURT'S ADMISSION OF EXPERT TESTIMONY ABOUT THE CAUSE AND ORIGIN OF THE FIRE WAS APPROPRIATE UNDER *DAUBERT*, *JOINER* AND *KUMHO TIRE*.

As noted, Petitioner did not make any contemporaneous objection to the qualifications, testimony or opinions of the five experts who collectively testified about the cause and origin of this fire and presence of accelerants. Accordingly, Petitioner waived appellate review, absent plain error.

Further, the decision by a District Court to admit expert testimony is subject to review only for abuse of discretion. *General Electric Co. v. Joiner*, 522 U.S. 136, 138-39 (1997). The District Court also had broad latitude "to avoid unnecessary 'reliability' proceedings in ordinary cases where the reliability of an expert's methods is properly taken for granted. . . ." *Kumho Tire Co., Ltd. v. Carmichael*, 119 S. Ct. 1167, 1176 (1999).

The four cause and origin experts called by Respondents had, between themselves, investigated thousands of fires. Three of the four were certified fire investigators. Two of these experts, Stephen Houghton and David Harrington, testified at length about the scientific bases for cause and origin determinations, including the properties of ignitable liquids which produce distinctive "liquid pour patterns" of the type found at the Austin fire scene. Respondents' chemist testified as to gas chromatography/mass spectrometry analysis of fire debris samples and the *Wall Street Journal*, confirming the presence in each of an ignitable liquid in the kerosene range consistent with the fuel oil Mr. Austin stored in an underground tank on his property. Testimony of this type is offered in almost every civil or criminal arson case, and is neither novel nor controversial. Petitioner has shown no abuse of discretion by the District Court in allowing uncontradicted and unchallenged expert testimony on the cause and origin of this fire.

IV.

THE DISTRICT COURT DID NOT ERR IN REJECTING JURY INSTRUCTIONS PROPOSED BY PETITIONER THAT MISSTATED GOVERNING VERMONT LAW.

Petitioner continues to dispute the jury instructions given by the District Court, claiming that the Court should have

issued instructions: (a) importing criminal concepts of "probable cause" into this civil case; (b) mandating a presumption of innocence as to consideration of circumstantial evidence; and (c) directing the jury that Respondents had somehow "waived" their right to present evidence. None of these instructions is based on Vermont authority. The Second Circuit correctly concluded that: "Austin cannot prevail on his jury instruction claims because other language in the charge clarified the proper standard for an affirmative defense of arson and his proposed instruction on defendants' waiver of certain evidence has no basis in law." App. B. *See Perry v. Ethan Allen, Inc.*, 115 F.3d 143, 153 (2d Cir. 1992).

V.

THE DISTRICT COURT DID NOT ERR IN DENYING PETITIONER'S SUMMARY JUDGMENT MOTION AND IN GRANTING RESPONDENTS' CROSS MOTION FOR SUMMARY JUDGMENT ON BAD FAITH.

Petitioner argues that he was entitled to summary judgment in this matter and that the District Court erred by granting summary judgment for Respondents dismissing Mr. Austin's bad faith claims. As the Second Circuit pointed out, there were material factual issues precluding summary judgment for Petitioner on the issue of arson. Furthermore, in view of the evidence that this fire was incendiary and the evidence obtained by the Vermont State Police, the Second Circuit concluded that Mr. Austin could not have prevailed on this bad faith claim under the standards adopted by the Vermont Supreme Court in *Bushey v. Allstate Insurance Co.*, 164 Vt. 399, 402, 670 A.2d 807, 809 (1995). App. B. Petitioner also ignores the implications of having driven up to this incendiary fire scene with his car trunk loaded with business records, personal valuables, a computer, photographs of his possessions and his homeowner's insurance policy.

VI.

THE DISTRICT COURT DID NOT ERR IN DISMISSING PETITIONER'S CLAIMS FOR INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS AND PUNITIVE DAMAGES AT THE CLOSE OF EVIDENCE.

Petitioner claims that the District Court erred in granting judgment as a matter of law on his claim of intentional infliction of emotional distress. However, he presented no evidence that he actually sustained extreme emotional distress as required by Vermont law, *see Sheltra v. Smith*, 136 Vt. 472, 476, 392 A.2d 431, 433 (1978). Similarly, he claims that the District Court erred in granting judgment as a matter of law on his punitive damages claim. Given the jury's determination that there was no liability, Petitioner's claim of error is moot.

VII.

THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN DECLINING TO PERMIT PETITIONER TO AMEND HIS COMPLAINT FOUR DAYS BEFORE THE FINAL PRE-TRIAL CONFERENCE AND ON THE EVE OF TRIAL.

Undeterred by dismissal of his bad faith claims on summary judgment, Mr. Austin sought to resurrect these claims via amended pleading filed on the eve of trial and long after the motions deadline under the extended scheduling order had expired. The amendment was not only untimely but futile, as the amended pleading attempted to revive a bad faith claim already dismissed from this case on summary judgment. There was no abuse of discretion in denying this amendment. *Cruden v. Bank of New York*, 957 F 2d 961, 972 (2d Cir. 1992).

VIII.

THE DISTRICT COURT DID NOT ERR IN REFUSING TO RULE OR INSTRUCT THE JURY THAT RESPONDENTS HAD "INADVERTENTLY WAIVED" THEIR RIGHT TO PRESENT EVIDENCE AT TRIAL.

Championing a theory that at least must be credited as novel, Petitioner asserts that both the District Court and Second Circuit erred in not concluding that Respondents "inadvertently waived" and "surrendered" their right to present any evidence at trial. Petitioner claims also that the jury should have been instructed that due to "inadvertent waiver," Respondents had no right to present evidence at trial. Neither claim has any basis in Vermont law. *See KPC Corporation v. Book Press, Inc.*, 161 Vt. 145, 148, 636 A.2d. 326, 327 (1993) ("waiver is a voluntary relinquishment of a known right"). This issue, too, is wholly without merit.

CONCLUSION

For the foregoing reasons, the petition should be denied.

Respectfully submitted,

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